IN THE SUPREME COURT OF THE STATE OF DELAWARE

SCOTT WHITAKER,	§	
	§	No. 542, 2010
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
STATE OF DELAWARE	§	ID No. 0906011687
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: October 26, 2010
Decided: January 10, 2011

Before **HOLLAND**, **BERGER**, and **RIDGELY**, Justices.

O R D E R

This 10th day of January 2011, it appears to the Court that:

(1) Defendant-Below/Appellant, Scott Whitaker, appeals from his Superior Court convictions for assault second degree and resisting arrest. Whitaker contends that the Superior Court violated his due process rights when it (a) imposed a sentence that exceeded the State's recommendation and the presumptive sentence under Delaware sentencing guidelines, and (b) did not allow him access to the Presentence Office recommendation. We find no merit to Whitaker's appeal and affirm.

(2) One morning, Scott Whitaker woke up his sleeping girlfriend to ask her whether she knew the location of his glasses. After she replied that she did not

know, Whitaker punched her and struck her with a hammer. When police arrived, Whitaker jumped out of a second floor window and fled. Police pursued Whitaker, tased him, and took him into custody.

(3) Whitaker was charged by indictment with possession of a deadly weapon during the commission of a felony ("PDWDCF"), assault second degree, and resisting arrest. The State dropped the PDWDCF charge in exchange for Whitaker's guilty plea as to the remaining charges. The State recommended probation. The following exchange occurred during the plea colloquy:

> COURT: Has anybody promised what your sentence is going to be?
>
> WHITAKER: No.
>
> COURT: Do you understand you could get up to nine years in jail and a fine of $2,300 or more?
>
> WHITAKER: Yes.

(4) Whitaker then entered a guilty plea for the assault second degree and resisting arrest charges, and the Superior Court accepted it as being freely, voluntarily, and intelligently made. It then ordered a presentence investigation ("PSI") and scheduled sentencing for a later date.

(5) While addressing Whitaker's criminal history at sentencing,[1] the Superior Court stated, "I find that this is one of the worst records I have ever seen. . . . And as I have said twice already, it is a mystery to me and I will never understand why the State is recommending probation." For assault second degree, the Superior Court sentenced Whitaker to eight years at level V, followed by six months at level IV.[2] The sentencing guidelines set the presumptive sentence at up to two years at level V.[3] For resisting arrest, the Superior Court sentenced Whitaker to one year at level V, suspended for one year at level III. The sentencing guidelines set the presumptive sentence at up to nine months at level I.[4] The Superior Court stated that it exceeded the recommended sentence because of Whitaker's "tendencies for violence and [his] threat to the community." The Superior Court also stated: "I have exceeded the guidelines in this case, sir, because of your past history of violence, particularly on women, and your potential for violence in the future."

[1] The PSI revealed several aggravating factors, including the following: (1) a 1980 conviction for assault with a deadly weapon; (2) a 1984 conviction for homicide; (3) three domestic violence charges from 2000 to 2002; (4) a 2009 charge for DUI (pled to reckless driving); (5) a 2009 aggravated assault with a weapon charge; and (6) a 2009 witness tampering charge.
[2] The Superior Court stated that the probation was imposed pursuant to title 11, section 4201(1) of the Delaware Code, because it is in excess of the maximum term allowed.
[3] *See Delaware Sentencing Accountability Commission Benchbook*, at 41 (2010). The maximum sentence for assault second degree is eight years at level V. *See* 11 *Del. C.* § 4205.
[4] *See Delaware Sentencing Accountability Commission Benchbook*, at 71 (2010). The maximum sentence for a first offense of resisting arrest is one year at Level I. *See* 11 *Del. C.* § 4206.

(6) Three months after he filed his notice of appeal, Whitaker moved for modification of his sentence on the ground that his constitutional rights had been violated because he did not have an opportunity to review the sentencing recommendation in the PSI report. The Superior Court denied that motion.

(7) We review alleged violations of constitutional rights *de novo*.[5] Whitaker first argues that the Superior Court erred when it imposed a sentence that exceeded the State's recommendation and the presumptive sentence under Delaware sentencing guidelines. But the State's recommendation does not bind the Superior Court.[6] Our review of a sentencing decision begins and ends upon a determination that the sentence was within statutory limits and was not based on information that is false or lacks minimum indicia of reliability.[7] Here, the sentence of eight years was within the limits allowed. Whitaker's criminal history and the facts of the assault are not in dispute. On the record before us, we find no violation of due process.

(8) Whitaker also argues that he should have been allowed to see the Presentence Office recommendation. We addressed the disclosure of PSI reports

[5] *See Bentley v. State*, 930 A.2d 866, 871 (Del. 2007).
[6] *See* Super. Ct. Crim. R. 11(e)(1)(B) ("[The attorney general may] [m]ake a recommendation . . . for a particular sentence, with the understanding that *such recommendation . . . shall not be binding upon the court*.") (emphasis added).
[7] *See Fink v. State*, 817 A.2d 781, 790 (Del. 2003).

in *Howell v. State*,[8] and concluded that requiring disclosure of the sentencing recommendation served no practical purpose:

> Since the imposition of sentencing is not a delegable responsibility, any sentencing recommendation of a presentence officer is purely advisory in nature and otherwise legally irrelevant. Officers employed to conduct presentence investigations are officers of the Court. As such, they are an arm of the Court and their recommendations to be considered privileged internal communications.[9]

The Superior Court Criminal Rules reflect this principle: "[T]he court shall allow the defendant's counsel . . . to read the report of the [PSI], including the information required by subdivision (c)(2) *but not including any final recommendation as to sentence*."[10]

(9) Whitaker argues that *Gardner v. Florida*,[11] a United States Supreme Court death penalty case, requires disclosure of the PSI recommendation. There, the Supreme Court held that due process requires disclosure of a PSI when the sentencing judge relied on information contained in the report that was never disclosed to the parties.[12] But the Superior Court did not rely on any factual assertions not disclosed in the PSI report. Both parties had an opportunity to review the factual assertions contained in it, but the sentence recommendation is a

[8] 421 A.2d 892 (Del. 1980).
[9] *Id*. at 900.
[10] Super. Ct. Crim. R. 32(c)(3) (emphasis added).
[11] 430 U.S. 349 (1977).
[12] *See id*. at 351.

privileged internal communication, which neither party has a constitutional right to review.[13]

(10) Whitaker also argues that we should remand this case to review the taking of his guilty plea because he was not warned that the Superior Court may depart from the State's recommendation and the presumptive sentence under the sentencing guidelines. But Whitaker does not allege how the taking of his plea was deficient, and the plea colloquy reveals that Whitaker understood that the Superior Court had discretion.[14]

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[13] *See Howell*, 421 A.2d at 900.
[14] "COURT: Do you understand you could get up to nine years in jail and a fine of $2,300 or more? WHITAKER: Yes."